Case No. 48299-1-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

In Re the Dependency of S.K.P.

REPLY BRIEF OF APPELLANT

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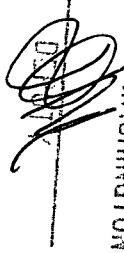

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I. INTRODUCTION

Ignoring the studies and proven negative impacts of passing time in foster care, and the known trauma to SKP,[1] DSHS attempts to take the moral high ground by recognizing the importance of family integrity. Response at 24.[2] However, DSHS fails to acknowledge the very real horror that all children in SKP's position experience when going through the dependency process.

DSHS also misses the point: due process does not ask what did the State do, but *what can the State do* in this proceeding? The right to counsel turns on the nature of the rights at stake – not exclusively on whether the threat presented to those rights is subsequently imposed. In an ongoing dependency proceeding, the state oversees every single aspect of the child's life. What *can* the State do in this proceeding? Just about anything. These wrenching proceedings, among the hardest for courts to manage, reveal the formidable power of the state to destroy human relationships and its lack of power to compel relationships to develop. To allow any litigant, much less a vulnerable child, to confront this power without the assistance of counsel offends due process.

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[1] App. Br. at 35-37 (timeliness of proceeding); 42 (racial disproportionality within foster care system); and 47-48 (foster children fare poorly in every measure of life outcomes).
[2] "Response" references the pleading filed by DSHS on July 1, 2016 entitled, "DSHS' Response To Motion For Discretionary Review."

II. ARGUMENT

A. State custody is not a benign experience for children.

SKP turned eight years old in foster care. CP 21. In his report filed on February 11, 2015 after SKP had been in foster care a little over three months, the volunteer Guardian ad Litem (GAL) assigned to SKP reported that she told him that she was "very excited about her upcoming birthday at Odyssey 1. "She is hoping that her siblings will be allowed to come, and that she is totally thrilled about getting to play laser tag with her siblings." *Id.* In the same report, the GAL admitted he had never observed a visit between SKP and her mother, but recommended the court depart from its previous order of liberal visitation, CP 12, to supervised visitation contingent upon the availability of a professional agency, CP 24. The GAL never deviated from his recommendation to limit visitation between SKP and her mother, even after he finally observed a visit and found "a strong bond" and registered "no concerns." CP 85-86. Eventually, the court allowed SKP's mother to move into SKP's maternal grandmother's home despite the GAL's continued recommendation to limit visits. CP 94.

The record is moot on numerous issues important to SKP. It does not say whether SKP's half-siblings made it to her birthday party, whether any efforts were made to help SKP maintain continuity in her relationships with them or her non-biological grandparents, whether any efforts were

made to help SKP maintain continuity in her schooling as protected by state and federal law, or why, despite court orders to consider SKP's therapist views, and episodes of SKP's resistance to visitation with Mr. K-P, the social workers and GAL continued to increase visitation with Mr. K-P, including overnights. It contains no information about why, long after the dependency was dismissed as to SKP's half-siblings, she alone remained in foster care until March 31, 2016.[3]

B. The proper "context" for this case involving children's rights in foster care is foster care.

A crucial part of the context of this case that DSHS acknowledges but tries to minimize is the impact of a dependency on a child's physical liberty, as discussed in section (E)(*b*) below. DSHS concedes that in many cases a major threat to physical liberty is apparent early on, and that in those cases counsel is necessary. Response at 22-23. But DSHS leaves out the most important contextual point: A dependency is not a single event but an ongoing and often very long process, and no one can predict what will happen over time. App. Br. at 33-36.

Physical liberty is limited immediately whenever any child is taken

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[3] This Court accepted discretionary review almost simultaneously with the voluntary dismissal of the dependency by DSHS. After briefing on mootness, this Court decided to keep review because of the substantial public interest involved. Ruling Denying Court-Initiated Motion to Dismiss, *In the Matter of the Dependency of SKP*, No. 48299-1-II (May 25, 2013).

into state custody. But more drastically, at any time in any dependency, further major threats to physical liberty can come into play very quickly: through failure of placements (even placements with family); the appearance of severe mental health or behavioral (even criminal) issues; and other factors. Once any of these things happens, it is too late to have the guiding hand of counsel to prevent the threat. Even when counsel is appointed after the fact, the child has already been harmed. The courts in dependencies are not dealing with sorting out the justice of a past event where the courts can re-do the case if it goes wrong. Rather, a child's ongoing life is involved and the volatility of foster children's lives makes very present in every case the potential for the loss of physical liberty.

Disregarding more-relevant case law about dependency, DSHS urges this Court to rely primarily on two cases that address other matters, not foster care: *Bellevue Sch. Dist. v. E.S.*, 171 Wn.2d 695, 257 P.3d 570 (2011) (initial truancy review hearings) and *King v. King,* 162 Wn.2d 378, 174 P.3d 659 (2007) (private dissolution proceeding), for setting context. *Bellevue* and *King* did not involve children in foster care, and did not consider the physical, emotional, and social needs of children living in state custody within the foster care system. *King*, in particular, did not consider the child's rights at all. The child's parents are not her potential or real adversaries in *Bellevue* or *King,* and strangers without lasting

connection to the child are not being made responsible for overseeing every aspect of the child's life.

Confronted with three issues of first impression, App. Br. at 1, this Court should consider its own unique case law, in addition to well-reasoned precedent from federal courts and sister jurisdictions. *See, e.g., State v. Chenoweth*, 160 Wn.2d 454, 470, 158 P.3d 595 (2007). But first, this Court should decide what is the proper "context" or precedent that can legitimately serve as an analogy to help determine the proper due process. *Braam ex rel. Braam v. State*, which held that foster children in Washington "possess substantive due process rights that the State, in its exercise of executive authority, is bound to respect," is the appropriate context in which to review this case because of the focus on children's rights when the state assumes custody and control of children. 150 Wn.2d 689, 698, 81 P.3d 851 (2003).

Putting SKP's three issues of first impression into the proper child welfare context as described in *Braam*, this Court must decide whether it is enough to say that sometimes the state is constitutionally required to appoint counsel in ongoing dependency proceedings or whether the compelling interests at stake require categorical appointment of counsel.

C. The Washington State Constitution guarantees a right to counsel for children to protect their interest in dependency proceedings.

a. DSHS' argument that Gunwall applies is to no avail.

SKP has discussed case law showing that the Washington Constitution controls this case, the lack of federal precedent on point, and the fact that *State v. Gunwall,* 106 Wn.2d 54, 720 P.2d 808 (1986), need only be applied when there is federal jurisprudence on point. *See* App. Br. at 15-16. Nonetheless, without citing to a single case supporting its position, DSHS claims that *Gunwall* applies even in the absence of federal jurisprudence. Instead, DSHS reads the cases that SKP cites out of context. Response at 7-8.

b. The Gunwall factors support an independent state constitutional analysis for children's right to counsel.

If the Court finds it necessary to do a *Gunwall* analysis, then the analysis will show that Wash. Const. art. I, § 3 should be interpreted independently of the 14th Amendment due process clause. In its discussion of *Gunwall*, DSHS makes broad claims that would effectively eviscerate *Gunwall*, citing case law that has nothing to do with dependency. Response at 13-15.

SKP and DSHS agree that the text of art. I, § 3 and the 14th Amendment are similar. However, contrary to argument by DSHS,

Response at 14, this similarity does not foreclose a *Gunwall* analysis because our courts have held similar provisions in state law are interpreted differently if there are "compelling rationales" for doing so, as there are here (see section (C)(b)(i)-(iv) below). *State v. Bartholomew,* 101 Wn.2d 631, 639, 683 P.2d 1079 (1984). Our Supreme Court in *Gunwall* held that "[e]ven where parallel provisions of the two constitutions do not have meaningful differences, other relevant provisions of the state constitution may require that the state constitution be interpreted differently." *Gunwall*, 106 Wn.2d at 61. *See also State v. Ortiz*, 119 Wn.2d 294, 319, 831 P.2d 1060 (1992) (art. I, § 3 should be "interpreted independently *unless* historical evidence shows the framers intended otherwise." (Johnson, J., dissenting) (citation omitted) (emphasis added). Since DSHS does not provide historical evidence or any reason for the court to forego an independent state analysis under the first and second factors, these factors should be resolved in favor of an independent state constitutional analysis.

Our state constitution was intended to broadly protect individual rights. App. Br. at 22. In keeping with this notion, Washington courts have found the state constitution to provide greater protection to individual rights than the federal constitution in numerous contexts. *See, e.g., State v. Jackson*, 150 Wn.2d 251, 264, 76 P.3d 217 (2003) (requiring a warrant to use global positioning system devices on vehicles); *In re Parentage of*

L.B., 155 Wn.2d 679, 712, 122 P.3d 161 (2005) (recognizing de facto parentage by same-sex parents). In the context of protecting children, the scope of individual rights protected by our state constitution is greater. In contrast with the federal, our State Constitute twice references the care of children. Art. IX, § 1 provides that it is the "paramount duty of the state to make ample provision for the education of all children residing within its borders. . . " Art. XIII, § 1 requires the state to foster and support institutions for the benefit of youth with physical or developmental disabilities or mental illness and "other such institutions as the public good may require." Such evidence provides an analytic basis for an independent state constitutional analysis here.

i. Pre-existing state law indicates that the Washington State Constitution is more protective.

Apparently misunderstanding the meaning of preexisting state law, DSHS uses the laws of the nineteenth century to argue about what pre-existing case law finds. Response at 16-18. In fact, pre-existing state law under *Gunwall* means the body of law in existence before the present case. In *Grant County Fire Prot. Dist. v. City of Moses Lake No. 5*, our Supreme Court recognized that due process evolves. 150 Wn.2d 791, 809, 83 P.2d 419 (2004). DSHS is correct that the *Grant County* Court looked at the law around the time the provision was adopted, Response at 16, but the

Grant County Court also looked to cases published in 1899, 1905, 1936, and 1947 – this last published almost five decades after adoption of our state constitution. 150 Wn.2d at 810. The *Gunwall* Court itself also looked at recent, as well as older, laws in weighing the fourth factor in favor of independent constitutional analysis. 106 Wn.2d at 66. The body of law pre-dating or in existence at the time of the adoption of our state constitution is not determinate, and the rights of children in the nineteenth century does not determine a case of first impression today.

It is less important *when* pre-existing state law was written in relation to the adoption of our state constitution than *how* the law relates to the present controversy. SKP and DSHS agree that whether the state due process clause provides greater protection than its federal analog depends on context. *Bellevue Sch. Dist.*, 171 Wn.2d at 711 ("[C]ontext matters when we are determining whether to independently analyze the state due process clause."). Although SKP relies on *Bellevue* for this proposition, DSHS argues this Court should almost exclusively rely on *Bellevue* for setting the context for this case. Response at 17-18. But the facts of the *Bellevue* case are significantly different: the Court was considering an initial truancy hearing. *Bellevue,* 171 Wn.2d at 711. Unlike in the context of foster care, the child in *Bellevue* was not in state custody and the *Bellevue* Court was not being asked to consider the child's best interests in

the context of removing children from their parent's care, taking control over decision affecting every aspect of the child's life.

Washington has a unique relationship with the children in its care, which compels an independent state constitutional analysis here. Therefore, the relevant pre-existing state law to consider here includes the historical perspective of the courts regarding child welfare proceedings. *See, e.g.,* App. Br. at 27; *Ex parte Fields*, 56 Wash. 259, 267, 105 P. 466 (1909) (not allowing biological mother return of her child placed for adoption because the change would not be in the child's best interests); *State v. Bell,* 58 Wash. 575, 577, 109 P. 51 (1910) ("The paramount right of the parent must, however, in all cases be held subordinate to the welfare of the child."). These cases demonstrate that Washington uniquely concerns itself with matters of child welfare by giving children both constitutional and statutory rights that have no federal analog. App. Br. at 25-27. The lack of federal equivalent for these laws provides a compelling reason to interpret art. I, § 3 differently than the 14th Amendment in the context of child welfare, specifically within the dependency proceeding.

ii. Differences in structure do not explain how to interpret the state constitution.

SKP and DSHS agree that the fifth *Gunwall* factor supports an independent state constitutional an analysis. Response at 14. However

DSHS argues the fifth factor should not be weighed in favor of an independent analysis because the fifth factor cannot tell this Court *how* to interpret art. 1, § 3. DSHS is wrong because none of the *Gunwall* factors tell the courts *how* to interpret the state constitution – only whether they *should* interpret the state constitution. *Gunwall,* 106 Wn.2d at 67 ("Having concluded on the basis of the foregoing analysis that we may appropriately resort to separate independent state grounds of decision in this case, we now proceed to do so."). If the *Gunwall* factors weigh in favor of independent analysis, then this Court must interpret art. 1, § 3 to determine whether the state constitution affords the protection pursued.

iii. Issues of family integrity are matters of state and local concern.

SKP and DSHS agree that the sixth *Gunwall* factor generally supports an independent constitutional an analysis per *Rose v. Rose*, 481 U.S. 619, 625, 107 S. Ct. 2029, 95 L. Ed. 2d 599 (1987). However, DSHS attempts to minimize *Rose* by arguing it is not enough to say these matters are governed by state law, by again relying on *Bellevue.* Response at 19. That case held that the sixth factor "does not support an independent analysis of the state constitution in the context of appointing counsel to represent a child in an initial truancy hearing." *Bellevue,* 171 Wn.2d 714. But in examination of the sixth factor, the *Bellevue* Court was asked to consider

two dueling explanations for art. IX, § 1 ("paramount duty" of the state to provide education). DSHS has not presented a competing interpretation of the state due process clause here. Moreover, as above, the question is not whether the sixth factor supports children's right to counsel, but whether it can be used to show that sufficient grounds exist to support an independent state constitutional analysis. As the Court in *Lassiter v. Dep't of Soc. Servs.* opined, minimum standards required under the 14th Amendment do not prevent state adoption of higher standards:

> Informed opinion has clearly come to hold that an indigent parent is entitled to the assistance of appointed counsel not only in parental termination proceedings, but also in dependency and neglect proceedings as well...The Court's opinion today in no way implies that the standards increasingly urged by informed public opinion and now widely followed by the States are other than enlightened and wise.

452 U.S. 18, 34, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981). Therefore, the sixth *Gunwall* factor weighs in favor of an independent constitutional analysis here.

iv. Other Factors.

The six *Gunwall* criteria are deliberately non-exclusive, allowing parties to make other arguments to support an independent analysis. *Gunwall*, 106 Wn.2d at 58. And as previously asserted by SKP, it is critical to consider larger societal trends in cases of first impression. App. Br. at 29-30. The fact that thirty-two other states and the District of

Columbia provide counsel to children in dependency proceedings, *Id.*, is not dispositive of whether such appointment is required by due process in Washington, "but it is plainly worth considering in determining whether the practice 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Schall v. Martin*, 467 U.S. 253, 268, 104 S. Ct. 2403, 2412, 81 L. Ed. 2d 207 (1984) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 S. Ct. 330, 332, 78 L. Ed. 674 (1934)).

Contrary to argument by DSHS, Response at 20, it does not matter whether other states provide children with the right to counsel through statute or court opinion. What matters here is that over two-thirds of the states[4] consider it offensive to leave a vulnerable child alone and unrepresented in an ongoing dependency proceeding.

Also, contrary to argument by DSHS that SKP offers no authority finding a universal right to counsel under a state due process clause, Response at 20, SKP cites to *Kenny A. ex rel. Winn v. Perdue*, 356 F. Supp. 2d 1353, 1359-60 (N.D. Ga 2005) (declaring children's

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[4] The Children's Advocacy Institute (CAI) and First Star, *A Child's Right to Counsel: A National Report Card on Legal Representation for Abused and Neglected Children* 123-24 (3d ed. 2012), *available at* http://www.caichildlaw.org/Misc/3rd_Ed_Childs_Right_to_Counsel.pdf.

constitutional right to counsel under state constitution).[5] This Court may look at instructive case law outside of Washington and our Supreme Court has already cited to *Kenny A.* twice: *In re Dependency of M.S.R.,* 174 Wn.2d 1, 16, 271 P. 3d 234 (2012), *as corrected* (May 8, 2012); and *In re Parentage of L.B.*, 155 Wn.2d 679, 712 n.29, 122 P.3d 161 (2005). *See also e.g., In re T.M.*, 319 P.3d 338, 131 Hawai'i 419, 435-36 (2014) (relying on Alaskan case, *Matter of K.L.J.,* 813 P.2d 276, 286 (Alaska 1991) for the proposition that a case-by-case approach under *Mathews*[6] is unworkable and could cause erroneous denial of counsel).

D. The Washington State Constitution confers a universal right to counsel.

Our state constitution is more protective of individual rights than the federal constitution because it has been interpreted to protect both physical liberty interests *and* fundamental liberty interests. *King*, 162 Wn.2d at 395; *In re Dependency of Grove*, 127 Wn.2d 221, 237, 897 P.2d 1252 (1995). DSHS overlooks this imperative fact.

Washington jurisprudence is clear that SKP, like all children in foster care, has fundamental liberty interests at stake in the conditions of her

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[5] Georgia state law only required appointment of counsel in termination cases, not ongoing dependency proceedings. The *Kenny A.* Court concluded that due process requires appointment of separate counsel for children in every case. 356 F. Supp. 2d at 1358.

[6] *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

care. DSHS disregards these interests by solely focusing on the physical liberty interest and then minimizes that interest by arguing that children are always in some form of custody. Response at 22-23. The effect of these fundamental liberty interests on right to counsel is critical. Because our state constitution protects not just physical interests, but also fundamental liberty interests, the existence of children's liberty interests and consequent threat in the ongoing dependency proceeding means our state constitution affords SKP and all children in dependency proceedings the right to counsel.

Additionally, in *MSR*, our Supreme Court held that "children have at least the same due process right to counsel as do indigent parents..." 174 Wn.2d at 20. Since our state constitution affords the right to counsel to parents, children must have *at least* the same right to counsel.

Forty years ago, the Washington Supreme Court held that, under the Washington State Constitution, a parent has a right to counsel in termination proceedings. *In re Luscier*, 84 Wn.2d 135, 138, 524 P.2d 906 (1974). While the U.S. Supreme found that no absolute right for parents existed under the federal constitution, *Lassiter,* 452 U.S. at 33, that ruling did nothing to disturb our Supreme Court's ruling in *Luscier* under our state constitution.

DSHS argues that 40 years of state jurisprudence has been abrogated

by *Lassiter*, Response at 9-11, an argument that ignores the fact that every division and every level of our appellate courts have favorably cited to the parents' right to counsel. *See In Re Hall*, 99 Wn.2d 842, 846, 664 P.2d 1245 (1983); *In re Dependency of Grove,* 127 Wn.2d at 237; *King,* 162 Wn.2d at 395; *In re Custody of B.M.H.*, 179 Wn.2d 224, 259, 315 P.3d 470 (2013) (Madsen, C.J., dissenting); *Dependency of G.G.*, 185 Wn. App. 813, 826 n.18, 344 P.3d 234 (2015), *review denied*, 184 Wn.2d 1009 (2015); *In re Dependency of A.M.M.*, 182 Wn. App. 776, 791, 332 P.3d 500 (2014); *In re Welfare of G.E.*, 116 Wn. App. 326, 332, 65 P.3d 1219 (2003); and *In re Dependency of H.,* 71 Wn. App. 524, 530-31, 859 P.2d 1258 (1993). *Lassiter* did not abrogate Washington jurisprudence guaranteeing a parents' right to counsel under our state constitution; these cases remain good law.

Yet even without our appellate jurisprudence, *Lassiter* has minimal relation to SKP's question of first impression under our state constitution because *Lassiter* did not (1) extend to, or even consider, dependencies; (2) extend to, or even consider, children, who have a unique position within the dependency as compared to their parents; or (3) somehow reach into the future to undermine cases decided by our appellate courts years, even decades, after *Lassiter* was published.

Contrary to DSHS' argument, no Washington court has "disavowed"

the state constitutional components in *Luscier*. Response at 11. Our Supreme Court in *Bellevue* observed the federal conflict between *Luscier* and *Lassiter* without rejecting the state constitutional component of *Luscier*. Instead, the *Bellevue* Court distinguished termination of parental rights proceedings from the proceeding before it – an initial truancy hearing to inquire as to the cause for the student missing school. 171 Wn.2d at 706. The *Bellevue* Court said "permanent deprivation proceedings" are "significantly distinguishable" from an initial truancy hearing. *Id.* at 712-13. While at least relating to foster care and thus closer in context here, *State v. Parvin* dealt with the technical question of whether court orders authorizing expert witnesses should be kept confidential as "work product" or otherwise sealed under GR 15. 184 Wn.2d 741, 364 P.3d 94 (2015). Like the *Bellevue* Court, the *Parvin* Court did not disavow the state constitutional component of *Luscier*. *Id.* at 759. The *Parvin* Court concluded that, to the extent that due process is implicated by orders authorizing experts, publishing the orders is "fully consistent with *protecting* parents' due process rights." *Id.* at 763 (emphasis added). No party to this case has suggested that denying counsel to children in ongoing dependency proceedings *protects* children's due process right.

E. This Court should find that children have a right to counsel in dependency proceedings under the 14th Amendment due process clause.

a. An ongoing dependency proceeding uniquely impacts children's fundamental liberty interests.

In *MSR,* a mother whose parental rights were terminated argued that affording children a constitutional right to counsel in dependency *and* termination proceedings follows national trends and best practices, and is supported by state and federal constitutional law. 174 Wn.2d 1. In response, DSHS asked our Supreme Court to consider only the termination of parental rights case. *Id.* DSHS argued that a termination case differs from an ongoing dependency proceeding because only the dependency involves the child's ongoing welfare.[7] Our Supreme Court agreed to DSHS's request, even amending its opinion to clarify that "[n]othing in this opinion should be read to foreclose argument that a different analysis would be appropriate during the dependecy (sic) stages." *Id.* at 22, n.13.

Now DSHS seems to argue the exact opposite: that *MSR* forecloses an

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[7] Specifically, DSHS argued: "The proceeding to terminate Ms. Luak's parental rights, like all parental rights termination proceedings in Washington, focused exclusively on whether the legal right of the parent to the care, custody, and control of her children should be terminated. A proceeding to terminate parental rights does not determine other issues regarding the child's ongoing welfare, such as whether the child is returned to the parent's home or remains in out-of-home care, such decisions are made in the separate dependency proceeding, which begins prior to the termination proceeding, continues after it, and encompasses all matters associated with the child's care and well-being during the dependency." Supp. Response Brief of DSHS at 4-5, *In re Dependency of MSR*, 174 Wn.2d 1 (No. 64736-9-1), 2011 WL 3694327.

independent analysis in ongoing dependency proceedings because termination cases are more intrusive. Response at 26-27. While a termination case centers on a termination trial to permanently sever the child-parent relationship, the dependency proceeding is ongoing and provides state oversight for every aspect of the child's life for the entire time he or she remains in state custody, regardless of the status of the termination case. Dependencies serve "the important function of allowing state intervention in order to remedy family problems and provide needed services." *In re Dependency of Schermer,* 161 Wn.2d 927, 942, 169 P.3d 452 (2007). A dependency court therefore has jurisdiction over several issues that a termination court does not, including where a child is physically placed, who a child can visit with, what services a child can receive and whether or not that child should continue to be a ward of the state.

DSHS baldly states that none of SKP's fundamental liberty interests, much less her physical liberty interests, were "actually" threatened in her ongoing dependency proceeding. Response at 24. It is hard to understand how DSHS missed the point of SKP's recitation of her physical and fundamental liberty interests, interests she has in common with all children subjected to ongoing dependency proceedings. By virtue of being in state custody, SKP's physical and fundamental liberty interests were

threatened in her ongoing dependency proceeding.

SKP provides this Court with a detailed procedural explanation of dependency proceedings and termination cases. App. Br. at 33-37. DSHS addresses none of the ways in which ongoing dependency proceedings uniquely jeopardize family integrity[8] through placement and visitation decisions and threaten the child's liberty interests in basic nurturing, physical and mental health, and safety. Furthermore, DSHS ignores the fact that it is the parent's (or occasionally the child's) failure to comply with services within the ongoing dependency proceeding that predicates DSHS filing a new case, with a separate cause number, to terminate parental rights.

b. Children's physical liberty interests are implicated in ongoing dependency proceedings.

SKP and DSHS agree that when physical liberty is at stake, a presumption arises in favor of appointing counsel. *Lassiter*, 452 U.S. at 26-27. Response at 22. DSHS further concedes that the physical liberty interest of some juveniles may be threatened in ongoing dependency proceedings. Response at 24. However, DSHS does not explain or

[8] Response at 24-27. DSHS continues to confuse the role of SKP's attorneys: SKP's attorneys profess nothing; SKP professes *her own concern* for her family integrity, *her own agency* and freedom of personal choice in matters of family life. *Id.* In this dependency proceeding, as in all such proceedings, the state dramatically and irreversibly intruded on SKP's right to the private ordering of her own fundamental interpersonal relationships.

otherwise describe what circumstances it agrees would threaten the child's physical liberty interests. *Id.* Without details, it is impossible to know the standard by which DSHS is comparing SKP's ongoing dependency proceeding. Ironically, this lack of information demonstrates how a case-by-case analysis requires children to compare themselves to their peers to argue that their case is sufficiently extreme to warrant counsel (a factor not contemplated in *Mathews*).

The physical liberty interests of all children in dependencies, including SKP, are implicated by the ongoing dependency proceeding. To reiterate, our Supreme Court has already recognized that a child has a physical liberty interest at stake in these proceedings: "It is the child, not the parent, who may face the daunting challenge of having his or her person put in the custody of the State as a foster child, powerless and voiceless, to be forced to move from one foster home to another." *MSR,* 174 Wn.2d at 16. Furthermroe, the *Braam* Court found foster children are involuntarily placed in custody and cannot seek alternate living arrangements, comparing children in foster care and children in offender proceedings. 150 Wn.2d at 698 (citing *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791, 795 (11th Cir. 1987)). The only federal court to recently consider the issue held that physical liberty interests are at stake in dependency proceedings. *Kenny A.,* 356 F. Supp. 2d at 1360-61. DSHS fails to explain why this

Court should deviate from its own unique case law or its sister court's well-reasoned precedent in *Kenny A.*

Placement decisions by DSHS present a tangible, even obvious, example of how the state oversees every aspect of the lives of children, like SKP, in ongoing dependency proceedings. But physical placement is just the outward manifestation of something deeper: the change in custody from parents to the state. DSHS takes children into custody and places them into foster care, where every single aspect of their lives – where they can go to school; whether they can get a driver's license; who can take them to games or a friend's house (if they are allowed to visit their friend); or how many drugs they can be forced to take – is made by a succession of strangers with no lasting permanent connection to them based on policies to maximize efficiency and minimize state liability.[9] The formidable power of the state was demonstrated to SKP when she was picked up by police, forcibly kept from her mother despite their close bond, separated from her half-siblings, and not allowed to return home. It does not matter whether SKP was lucky enough to have avoided the average three

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[9] DSHS' suggestion that state custody and parent custody are equivalent, relying on *Schall* for support, Response at 28-30, is unsupported by the facts of this case and the dismal outcomes for children in foster care.

placement changes[10] that her peers experience in foster care or forced in-patient hospitalization, group homes, or nights spent in hotel rooms with social workers (or worse, detention facilities) during her time in state custody as a foster child. SKP could have experienced any of those scenarios and did experience profound intrusions by the state into her childhood because she was taken into state custody. In sum, SKP's physical liberty interests were threatened the moment the state replaced SKP's mother as her legal custodian.

F. A *Mathews* analysis should be applied contextually to all children in dependency proceedings.

a. The case-by-case approach is unworkable for children.

If this Court finds that children's physical liberty interests are *not* implicated in ongoing dependency proceedings, then this Court should apply *Mathews* to ongoing dependency proceedings *contextually* based on the character of the proceeding rather than *individually* by the characteristics of the litigants. *See Lassiter*, 452 U.S. at 49 ("The flexibility of due process, the Court has held, requires case-by-case consideration of different decision-making *contexts*, not of different

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[10] Treehouse, *Taking on Challenges with Fierce Optimism.* http://www.treehouseforkids.org/why-treehouse/foster-care-facts/, (last visited Aug. 1, 2016).

litigants within a given context. In analyzing the nature of the private and governmental interests at stake, along with the risk of error, the Court in the past has not limited itself to the particular case at hand. Instead, after addressing the three factors as generic elements in the context raised by the particular case, the Court then has formulated a rule that has general application to similarly situated cases.") (Blackmun, J., dissenting) (emphasis in original).

Here, DSHS ignores SKP's detailed arguments about why the case-by-case approach should be rejected. Its only argument in favor of the case-by-case approach is a quick citation to *Lassiter* and *MSR* with no case analysis or explanation for why the cases should be expanded to children or ongoing dependency proceedings. Response at 26.

Applying *Mathews* to the ongoing dependency proceeding context, versus the individual child subjected to the proceeding, is always appropriate given the child's – and the court's – profound investment in ensuring stability, better outcomes, and the accuracy and justice of the court's decision-making. First, the case-by-case approach is unworkable because it makes the decision of whether children are appointed counsel dependent on where they live. This system creates disparities across Washington that DSHS wholly ignores in its response. App. Br. at 43. Second, the case-by-case approach is unworkable because it requires an

attorney to ask for appointment of counsel. App. Br. at 43-45. An individualized inquiry needlessly burdens litigants and courts while the associated delays cause irreversible harm to children. App. Br. at 45-48. DSHS addresses none of these burdens and harmful outcomes, and ignores SKP's assertion that children should have a right to counsel to protect them from harm before it occurs – not after.

b. Because children's unique and compelling interests are present in every case, no other party can protect their interests in an ongoing dependency proceeding.

All children in dependencies are similarly situated in a larger sense, confronting allegations of abuse and neglect by their parents in the adversarial proceeding that implicates every one of their constitutionally protected physical and fundamental liberty interests. Yet children are the only parties without anyone at counsel table—even when the other parties, represented by attorneys, are the child's technical (and sometimes real) adversaries in the proceeding. Suparna Malempati, *The Illusion of Due Process for Children in Dependency Proceedings*, 44 Cumb. L. Rev. 181, 221 (2014). *See also* Erik Pitchal, *Children's Constitutional Right to Counsel in Dependency Cases*, 15 Temp. Pol. & Civ. Rts. L. Rev. 663, 689 (2006) (conflicts between children and the other parties' needs).

c. *All children have compelling private interests at stake in ongoing dependency proceedings; not just a select few as argued by DSHS.*

The first *Mathews* factor requires weighing the private interest at stake. 424 U.S. at 335. It weighs strongly in *favor* of right to counsel for children in dependency proceedings. DSHS attempts to minimize the interests of children, including SKP, in the dependency proceeding. Response at 21-26. Minimizing these interests does not comport with our Supreme Court precedent that children have fundamental liberty interests at stake in these proceedings. *Braam*, 150 Wn.2d at 699; *MSR,* 174 Wn.2d at 16; *Moore v. Burdman,* 84 Wn.2d 408, 411, 526 P.2d 893 (1974) (describing child's fundamental liberty interest in "having the affection and care of his parents."). These fundamental liberty interests by their very nature are substantial private rights of a child, which a dependency proceeding threatens, even while the DSHS endeavors to protect those same interests as best it can under the particular circumstances with hopefully the best of intentions.

Therefore, the first *Mathews* factor should always favor appointment of counsel without any need to compare which of the child's liberty interests are most jeopardized or debate of how these interests are more or less like the cases of traumatized children who have gone before. Such an application of the case-by-case approach creates an oppressive, subjective

standard.

d. The current procedural safeguards are inadequate, as no other party can be relied upon to protect children's physical and fundamental liberty interests in an ongoing dependency proceeding.

DSHS argues attorneys for children are duplicative, Response at 30-31; however, no other party can be relied upon to protect children's legal interests because as soon as a conflict emerges between the child's goals for the ongoing dependency proceeding and the other parties' own goals, any potential safeguard vanishes. Further, it is almost impossible for anyone to predict with whom or when, where, why, and how that conflict may arise.

Parents. Parents cannot adequately mitigate the risk of harm to the child in the ongoing dependency proceeding, when they may not even be allowed to talk to the child. *Kenny A.*, 356 F. Supp. 2d at 1359 (the very nature of the proceedings, which allege the parent's unfitness to care for their children, suggests an "inherent conflict of interests" between parents and children). Parents also have their own goals within the dependency proceeding. Pitchal, 15 Temp. Pol. & Civ. Rts. L. Rev. at 685-86 ("Only separate counsel for the child, with full standing to participate, can guarantee that issues that are of priority for the child--she has not been taken to the eye doctor for over a year, for example--are heard and

considered.").

DSHS. DSHS cannot advocate for the goals of any child when its first concern is avoiding liability.[11] As the *Kenny A.* Court noted, there is "strong empirical evidence that [the State] makes erroneous decisions on a routine basis that affect the safety and welfare of foster children." 356 F. Supp. 2d at 1361. *See also, e.g., Braam,* 150 Wn.2d 689; *Tamas v. Dep't. of Soc. & Health Servs.,* 630 F.3d 833 (9th Cir. 2010) (lawsuit against DSHS for harm caused by years in foster care). In SKP's case, for example, liability concerns may help to explain why DSHS took so long to allow SKP's mother to move in with her and why DSHS took so long to dismiss the dependency.

Rather than oppose counsel as it has in the instant case, to the extent it has a *parens patriae* duty to look out for the best interest of the child, DSHS should do all it can to avoid an unfair, mistaken, or arbitrary decision, including supporting the appointment of counsel in the ongoing dependency proceeding. *In Matter of Jamie TT,* for example, the court noted that the government's interest in protecting children favored the appointment of an attorney because it was "clearly necessary to avoid an

[11] "As part of their commitment to protecting and serving children, state child welfare agencies are interested in operating a system that is as cost-effective as possible. The reality is and always will be that government funds are limited, and social service agencies maximize their efficient use of each dollar." Pitchal, 15 Temp. Pol. & Civ. Rts. L. Rev. at 689.

erroneous outcome unfavorable" to the child. 191 A.D.2d 132, 136, 599 N.Y.S.2d 892 (1993).

It is also worth noting that DSHS claims – without citation to any evidence in or outside the record or any secondary source – that it "rarely" opposes appointment of counsel. Response at 32. The declaration filed by the Administrator for Pierce County Juvenile Court, TJ Bohl, states that there are 1,426 children subjected to ongoing dependency proceedings in Pierce County and only 139 children who are appointed attorneys based on judicial discretion. CP 233-235. Thus, this Court can take judicial notice that more than ninety percent of these vulnerable children are alone and unrepresented in Pierce County. *Id.* DSHS does not say among the 139 children with attorneys how many times it opposed appointment of their attorneys, and it does not provide statistics about how many times in the remaining dependency proceedings DSHS successfully persuaded the juvenile court not to appoint attorneys.

GAL. Even if a GAL or Court Appointed Special Advocate (CASA) is eventually appointed in the ongoing dependency proceeding,[12] most often he or she is a lay volunteer with less than thirty hours of training – not an

[12] Volunteer guardian ad litem programs do not operate in every county and within those programs, appointment is spotty. *In re Dependency of A.G.*, 93 Wn. App. 268, 968 P.2d 424 (1998), *as amended* (Feb. 1, 1999) ("At oral argument, counsel for DCFS candidly informed us that trial courts regularly fail to appoint a guardian ad litem in these circumstances or find good cause for not appointing one based on lack of resources.").

attorney trained to maintain confidential communications, able to provide legal advice on potentially complex issues that are vitally important to the child, required to undertake special education on representing child-litigants, and bound by ethical duties. *MSR*, 174 Wn.2d at 21 ("[w]e recognize the different, important, and valuable roles of GALs, CASAs, and counsel to children in dependency and parental termination proceedings"); Washington Administrative Office of the Courts, *Meaningful Representation For Children And Youth In Washington's Child Welfare System* (2010) (outlining the heightened training and caseload standards for children's attorneys).[13]

An attorney for a child is uniquely allowed to subpoena the child's own witnesses, to prepare and interrogate witnesses, and to spot legal issues. GALs "are not trained to, nor is it their role to, protect the legal rights of the child." *MSR*, 174 Wn.2d at 21. GALs serve as the "eyes and ears" of the dependency court; they do not, however, direct the course of litigation in an ongoing dependency proceeding or have the duty to advocate for the child's goals in the proceeding. In this case, for example, SKP disagreed with the recommendation of the GAL, who openly advocated against SKP's interests. This could be one reason SKP

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[13] *Available at* http://www.law.washington.edu/Directory/Docs/kelly/HB2735.pdf.

expressed frustration in her declaration supporting her request for counsel that no one was hearing her. CP at 138.

Court. Judges, unlike attorneys for children, cannot conduct their own investigations and depend entirely on others to provide them with information and argument. *Kenny A.*, 356 F. Supp. 2d at 1361. The court cannot protect the child from harm when only the child knows his or her own goals for the dependency proceeding.

e. Due process is an expensive, but necessary, component of a free society.

The third *Mathews* factor requires a court to weigh the State's interest in the proceeding, including fiscal and administrative burdens, against the State's competing interests in ensuring the child's well-being. *Kenny A.*, 356 F. Supp. 2d at 1361; *see also Mathews*, 424 U.S. at 335; *MSR*, 174 Wn.2d at 14. Identifying significant constitutional due process rights for foster children in *Braam*, our Supreme Court noted that "[l]ack of funds does not excuse a violation of the Constitution." 150 Wn.2d at 710 (citing *Hillis v. State, Dep't of Ecology*, 131 Wn.2d 373, 389, 932 P.2d 139 (1997)). Here, Pierce County spends more money on office supplies than on children's representation. App. Br. at 49-50.

G. This Court has not been asked to strike down any laws on children's right to counsel.

Although children have no constitutional right to state intervention to

protect them from their own parents, once the state intervenes, as occurs in a dependency proceeding, such rights attach. *MSR*, 174 Wn.2d at 17 (citing *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 201, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989)). Thus, a child's fundamental liberty interests are at stake, not only in the initial deprivation hearing, but also in the series of hearings and reviews that occur once a child comes into state custody. *Kenny*, 356 F. Supp. 2d at 1360.

Under RCW 13.34.100, our legislature tasked the juvenile court to notify children over 12 that they can request counsel, vested the court with discretion to appoint counsel for any child of any age, and made mandatory the appointment of counsel for any child of any age six months after termination of parental rights. In so doing, the legislature recognized that children have due process rights in dependency proceedings. SKP has not asked this Court to strike RCW 13.34.100 down as unconstitutional. Sister jurisdictions considering these issues have not found it necessary to do so: "Our decision does not render [state law], which allows courts the discretion to appoint counsel on a case-by-case basis, unconstitutional. Rather, our decision augments [law] in recognition of the due process protection in the Hawai'i Constitution afforded to parents." *In re T.M.*,319 P.3d at 355, n.26 (citing *In re Doe*, 57 P.3d 447, 458, 99 Hawai'i 522 (2002)) ("Procedural due process requires that an individual whose rights

are at stake understand the nature of the proceedings he or she faces.").

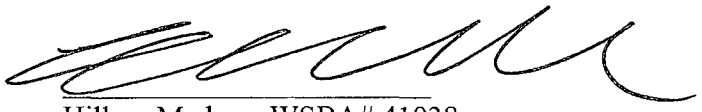
Under RAP 10.3(g), the appellate courts review only issues "set forth in an assigned error or clearly disclosed as an associated issue." *Pierce Cnty. v. State*, 144 Wn. App. 783, 844 n.23, 185 P.3d 594 (2008), *as amended on denial of reconsideration* (July 15, 2008). In Division II, General Order 98-2 (In Re The Matter of Assignments of Error) allows an appellant to "use a single assignment of error to identify more than one challenged jury instruction, finding of fact, or conclusion of law." Despite Pierce County's assertion to the contrary, the trial court error in this case was denying SKP's request for an attorney was identified by SKP; the verbatim text of the court's order was attached to SKP's Motion for Discretionary Review, included in the Clerk's Papers provided to this Court, and now cited in full by Respondent Pierce County. County Response at 2-4 (citing CP 339-342). The trial court was wrong to deny SKP an attorney and SKP's challenge to the court's denial is clear from her assignment of error and legal arguments.

III. CONCLUSION

Abused, neglected, and abandoned children are removed from their families and plunged into an under-resourced and overburdened dependency system that strives to serve their best interests. Children need more than just the protection of well-intentioned adults; they need a voice

in the critical decisions that will decide their future. They need a lawyer to advocate for them in the courtroom of lawyers representing the many other parties trying to be heard. The court needs to understand the child's legal interests from her own perspective alongside those of the other parties to determine the best interests of the child. When our State has exercised its ultimate power to strip children from their families, children need the only person who will zealously advocate for their own goals within the ongoing dependency proceeding. Children need a lawyer.

Respectfully submitted this 1st day of August, 2016.



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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

In re the Dependency of S.K.P., Minor Child,	)	Case No. 48299-1-II
Appellant.	)	CERTIFICATE OF SERVICE

Adriana Hernandez declares under penalty of perjury that the foregoing is true and correct under the laws of the State of Washington.

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- Reply Brief of Appellant

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Dated this 1 day of August, 2016.

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